IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10397 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VIPOR CHEMICALS PVT. LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 10397 of 2004
MR MIHIR JOSHI, SR. ADVOCATE FOR MR DHAVAL SHAH for Petitioner
MR JITENDRA MALKAN for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2-3
NOTICE SERVED for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 04/03/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. Rule. Mr.Jitendra Malakan waives service of rule, taking into consideration the fact that the facts are not disputed and the controversy lies in a very narrow compass.

2. The petitioner, a Limited Company, engaged in production, clearance and export of finished excisable goods being bulk drugs and intermediates including Chlorhexidine Gluconate, approached respondent Nos. 2 and 3 seeking conversion of Shipping Bills from Duty Free Replenishment Certificate (DFRC) Scheme to Duty Entitlement Pass Book (DEPB) Scheme. This application was moved on 1st April 2003. On 7th October 2003, respondent No.2 wrote to petitioner stating that the Director General of Foreign Trade (DGFT) Public Notice No.69/2002-2007 has been effective from 10th March 2003, but the petitioner had claimed the same to be effective from 1st April 2002 and such claim was not supported by any documentary evidence. Therefore, the petitioner was requested to submit the basis of the claim. The petitioner accordingly approached DGFT seeking clarification. On 30th December 2003, DGFT addressed a letter to respondent No.2, with reference to the aforesaid letter of 7th October 2003, a copy of which had been forwarded to DGFT, and in the said letter of 30th December 2003 (Annexure "D"), DGFT has stated thus:

> "Please refer to the letter mentioned above regarding effective date of applicability of DEPB rates in respect of "Chlorhexidine Base / Gluconate". In this connection, it is clarified that "Chlorhexidine Base / Gluconate" was covered under DEPB S.No.908 of Chemicals until 31.3.2002. While publishing the new rate list which is effective from 1.4.2003 inadvertently the above export product description was wrongly described as "Chlorhexidine Base" only at S.No.837 of Chemicals. However, same was rectified by this office Public Notice No.69/2002-07 dt. 10.3.2003 (copy enclosed) by way of correction. Since corrections have retrospective effect, the description at S.No.837 of Chemicals is deemed to have been corrected w.e.f. 1.4.2002. This is for information and necessary action."

3. On 19th February 2004, respondent No.2 rejected

the request for conversion by making reference to board circular No.04/2004-CUS dated 16th January 2004. It is this communication (Annexure "E") which is under challenge.

4. Originally, when the petition was moved, DGFT was not joined as a respondent, but on 24th August 2004, the Court granted permission to add DGFT as respondent no.4 with permission to serve the said authority by speed post at petitioner's cost. Thereafter, the matter was adjourned from time to time. On 11th February 2005, Mr.Malkan had sought time to tender affidavit in reply on behalf of respondent No.4 and the Court had granted time by passing an order in the following terms :

> "Reply affidavit to be filed on or before 21st February 2005. Rejoinder affidavit, if any, be submitted on or before 28th February 2005. To come up on 4th March 2005."

5. Today, when the matter was taken up for hearing, a prayer was made by Mr.Malkan for time to tender affidavit in reply of respondent No.4. However, in light of the fact that the matter has been adjourned number of times and the aforesaid categorical order made by this Court on 11th February 2005, the Court has turned down the said request. At this stage, Mr.Malkan has tendered a note dated 22-11-2004 containing instructions from Joint DGFT.

6. There is no dispute as to the fact that the petitioner has been exporting "Chlorhexidine Gluconate" and was availing of benefits under the DEPB Scheme. It appears that, in pursuance of announcement of EXIM Policy 2002-2007, the said product was, through oversight, left out by DGFT while specifying rates under DEPB Scheme. Various representations and reminders were made to DGFT and in consequence thereof, Public Notice No.69/2002-2007 dated 10th March 2003 came to be issued. The product in question appears at S.No.837 under product group of chemicals bearing product code No.62. The only grievance raised by respondent No.2 was as to whether the said public notice was effective from 1st April 2002 or not, because the public notice was dated 10th March 2003. It is, in this context, that the DGFT has issued communication dated 30th December 2003 (Annexure "D") which has been reproduced hereinbefore. From the said communication, it is more than clear that the publication of new rate list is effective from 1st April 2002 and it was only inadvertently that the product had wrongly been described in the earlier publication.

7. The respondent authority, namely second respondent, finding that the objections which were raised vide communication dated 7th October 2003 having been redressed, changed its stand and denied the request for conversion on 19th February 2004 by referring to Board Circular dated 16th January 2004. As can be seen from the said communication, except for stating that the said circular No.4/2004-Customs dated 16th January 2004 has superceded earlier circulars bearing No.6/2003-CUS dated 28th January 2003 and No.40/2003-CUS dated 12th May 2003, nothing further has been stated as to why conversion is not being allowed. Even assuming that the ground regarding circular dated 16th January 2004 being applicable was a valid ground, as can be seen from the said circular, respondent No.2 has failed to make out a case as to which of the requirements stated in the circular are not fulfilled so as to disentitle the petitioner. In the affidavit in reply, in paragraph No.7, it is stated that condition (a) of paragraph No.3.2 of board circular dated 16th January 2004 has not been fulfilled by the petitioner and therefore, conversion in question was not allowed.

8. The impugned order / communication dated 19th February 2004 does not give any such reason and in the circumstances, it is not possible to accept the reason assigned in the affidavit in reply which is improving upon order of rejection. It is settled law that an order has to stand or fall on its own, without deriving any support from subsequent averments made in the affidavit in reply.

9. In the circumstances, there being no reason, either on facts or in law, which would disentitle the petitioner from claiming conversion of its DFRC Shipping Bills to DEPB Shipping Bills, the impugned communication dated 19th February 2004 is hereby quashed and set aside. The respondent authorities are directed to permit conversion as claimed by the petitioner forthwith, not later than 18th March 2005.

10. The petition is allowed accordingly. Rule made absolute. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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